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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 1412

FRED L. DUNN, JR.,

Petitioner,

v.

BERNARD KAPILOFF AND LEONARD KAPILOFF, TRADING AS MORKAP PUBLISHING COMPANY, ROGER B. FARQUHAR, WILLIAM H. BANCROFT, JR., AND ROBERT U. WOODWARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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The opinion of the Court of Special Appeals of Maryland is reported in 27 Md. App. 514, 343 A.2d 251. (Petitioner's Appendix A).

JURISDICTION

Petitioner invokes jurisdiction under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. In conducting an independent review of the evidence found by the jury to show the "constitutional malice" required of the plaintiff in a libel case, is a State Appellate Court constitutionally prohibited from adopting interpretations of defamatory words and inferences of fact tending to show actual knowledge of falsity solely because the publishers present a different theory attempting to negate reckless disregard for the truth?

2. Does the proposition in *Gertz v. Welch*, 418 U.S. 323 (1974), that under the First Amendment, there is no such thing as a false idea, abrogate and supersede the qualified privilege announced in *New York Times Co., v. Sullivan*, 376 U.S. 254 (1964), insofar as that case may apply to a purported statement of opinion, creating thereby an absolute privilege for such statements even if the publisher does not honestly hold the opinion stated?

3. Does the duty of a State Appellate Court, enunciated by the Supreme Court of the United States in *New York Times Co. v. Sullivan* and subsequent cases, to review the constitutional sufficiency of the plaintiff's evidence in a libel case extend to affirmative fact finding on the appellate level?

COUNTER-STATEMENT OF THE CASE

This libel action was instituted by Petitioner against Respondents in the Circuit Court for Montgomery County, Maryland. The Petitioner's action was based on a newspaper article published by Respondents, the owners, editor and reporters of a newspaper of general circulation in Montgomery County, Maryland, that Petitioner was "unsuited" to be principal of Robert E. Peary High School, a position he then held. The facts

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presented at trial are summarized in the opinion of the Maryland Court of Special Appeals (Petitioner's Appendix A, at 30-33) and are briefly summarized as follows:

The statement that Petitioner was "unsuited" was based on seven factors:

(1) The tone of "disciplined education" set by Petitioner;

(2) The institution of few, if any, innovative programs;

(3) Student and parent complaints concerning the "stifling and boring" atmosphere at the high school and the "open hostility" between many students and Petitioner;

(4) Teacher dissatisfaction and harassment;

(5) Censorship of the school newspapers;

(6) The fact that Petitioner had been recommended for transfer to a junior high school by the Superintendent of Schools; and

(7) The Petitioner's actions in banning certain speakers at a school function and the resultant "protest march" by Petitioner's students to the School Board Headquarters.

Evidence presented by Petitioner at trial attempted to explain the circumstances surrounding (6) and (7). He conceded that the Superintendent of Schools had recommended his transfer to a junior high school and that his banning of certain speakers at a student function had resulted in a march of "around 300" students to the Board of Education. He conceded that he had other problems with his students including friction with the student year book and school newspaper staffs and the Student Government Association. Controversies between Petitioner and the Student Government Association included the issue of voluntary school assemblies, the "open campus" proposal and voter registration for school elections, the latter

being described by Petitioner as "a cause celebre". The Student Government Association voted 48 to 2 in favor of the Petitioner's transfer to a junior high school.

In addition, Petitioner testified to disputes between himself, parents and the Parents Teachers Association. His relationship with his teachers was such that during the 1970-71 school year the faculty "lodged a grievance with the Superintendent under the Grievance Procedure" protesting certain scheduling problems at the high school. In addition, the entire English Department filed a "Petition" with Petitioner sending copies to his superiors. The Petition contained a list of grievances the English Department had about the school in general and Petitioner in particular.

At trial Petitioner read a statement which he had prepared for the School Board when he opposed his transfer to a junior high school. The statement listed "my desire to control the educational atmosphere of the school would be better suited to a junior high school" as one of two reasons given him by the Superintendent of Schools when he was told of the transfer recommendation. He did not dispute other factors upon which the Respondents' base their conclusion that he was "unsuited" to be principal of Peary High School.

It was conceded at trial that Petitioner was both a public official and public figure. The Trial Court overruled all of Respondents' motions based on the argument that the facts did not demonstrate knowing falsity and reckless disregard of the truth. Following a jury verdict in Petitioner's favor and an appeal to the Court of Special Appeals of Maryland, that Court reversed the judgment of the Trial Court and the Court of Appeals of Maryland refused to grant certiorari.

THE WRIT SHOULD NOT BE GRANTED

The questions presented for review are frivolous and have no applicability to the facts of this case. The Court of Special Appeals simply reviewed the facts presented in the Trial Court to determine whether they were constitutionally sufficient to support the verdict. This it was required to do by numerous decisions of this Court. *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710 (1964); *Speiser v. Randall,* 35 U.S. 513, 525, 78 S. Ct. 1332, 1342 (1957). It properly found that the evidence was not constitutionally sufficient to support the verdict and reversed. In so doing, it did not, as suggested by Petitioner, adopt any new interpretation of the allegedly defamatory publication. Petitioner argues that the newspaper article suggested that he lacked necessary educational qualifications. However, the evidence indicated only that he was "unsuited" to be principal of Peary High School.

Petitioner cites *Gertz v. Welch,* 418 U.S. 323, 94 S. Ct. 2997 (1974) for the proposition that the states are free to set their own burdens of proof in libel actions. However, that decision does not apply when the libel plaintiff is either a public official or public figure. Petitioner was both, and the Court of Special Appeals properly reviewed the judgment of the Trial Court applying the standard of *New York Times v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710 (1964). It found no evidence that Respondents knew their statement was false or acted in reckless disregard of the truth as requred by the Court decision in *New York Times v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710 (1964) and properly reversed the judgment of the Trial Court.

Petitioner's argument that he has been denied the right to have a jury hear and pass on the evidence presented again ignores the requirement that the

Appellate Court review, as did the Court of Special Appeals, the evidence in this case for constitutional sufficiency. Moreover, this Court has stated that, in libel actions involving public figures and public officials summary disposition is in accordance with constitutional principles. Petitioner's Seventh Amendment arguments were rejected by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S. Ct. 710, 729 (1964) Footnote 26.

Contrary to Petitioner's argument, the Court of Special Appeals specifically refused to attach an absolute privilege to the allegedly libelous statement, but rather held that the statement was protected by a qualified privilege under both the Constitution and state common law. The Court below held that whether the defense of fair comment under Maryland law were applicable or the constitutional defense arising under the *New York Times* rule, the result would be the same. Petitioner had to show evidence of knowing falsity or reckless disregard of the truth. See *Jacron Sales Co. v. Sindorf*, 276 Md. 580 (1976). He did not and, accordingly, his cause of action failed.

Finally, Petitioner seems to argue that the Maryland Court of Special Appeals undertook affirmative fact finding rather than simply reviewing the facts presented at the Trial Court. There is absolutely no evidence to support this contention. The Court of Special Appeals only reviewed and construed the facts presented at trial and concluded that Petitioner's case was woefully deficient of proof necessary to overcome the constitutional privilege applicable to the case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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